

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JESUS BRITO,

Plaintiff,

-v-

LUCKY SEVEN RESTAURANT & BAR, LLC, D/B/A
LUCKY 7 TAPAS BAR, LA CASA DEL MOFONGO
INC., FELIX CABRERA, AVI DISHI, AND JOHN
DOES #1-10,

Defendants.

19 Civ. 3876 (PAE) (KHP)

ORDER

PAUL A. ENGELMAYER, District Judge:

A bench trial on the issues in this case that were not resolved on summary judgment is scheduled to begin on Monday, October 18, 2021. On Friday afternoon, October 15, 2021, defense counsel filed a letter on the docket of this case claiming to have recently discovered “a very shocking and wildly inappropriate video” involving plaintiff Brito which defendants assert “would materially impact the character of the Plaintiff and this case.” *See* Dkt. 84. Later the same afternoon, plaintiff’s counsel filed a letter in response, stating that the defense had not shown the video to the plaintiff or previously made the existence of the video known, and stating that, based on the general manner in which it was described, the video would not be admissible under the Federal Rules of Evidence. *See* Dkt. 85.

The Court is disappointed—to say the least—in defendants’ failure to share the video with plaintiff’s counsel in advance of writing the Court, or to confer with plaintiff’s counsel in advance of doing so. To rectify this lapse, and to assure that the Court’s consideration of the issues presented by the defense’s claim to have recently uncovered this video and its

application to offer at trial is the product of informed input from both sides, the Court directs the following:

1. By **2 pm on Saturday, October 16, 2021**, defense counsel is to send a copy of the video, by email, to plaintiff's counsel. For avoidance of doubt, defense counsel is not to send a copy of this video to the Court.
2. By **10pm on Saturday, October 16, 2021**, defense counsel is to file on the docket of this case a sworn declaration attesting in detail as to (a) how and when the defense came into possession of the video, (b) the reasons, if any, for the defense's failure to disclose or share the video with plaintiff's counsel before writing the Court, and (c) the basis, under the Federal Rules of Evidence, under which defense counsel believes the video is admissible, as opposed to being bad-character evidence excludable under Federal Rules of Evidence 404 and 403. This declaration is also to be emailed to plaintiff's counsel and to the Court. In the event aspects of the description in counsel's letter merit redaction from the public record, *e.g.*, because the letter implicates privacy interests of persons shown on the video, counsel is authorized to redact the letter in the form filed on the docket of this case, but counsel is to file under seal (and email to the Court and opposing counsel) the letter in its unredacted form.
3. By **5pm on Sunday, October 17, 2021**, plaintiff's counsel is to file on the docket of this case a response, which should address, at a minimum, whether the video is admissible under the Federal Rules of Evidence and whether the circumstances of the video's discovery and disclosure independently disfavor its receipt in evidence.
4. At trial on **Monday, October 18, 2021**, the Court will take up the issues presented by the video and the parties' submissions. To enable the Court to review the video in the event

that the Court determines there is cause to do so, defense counsel are to have the video accessible on their laptops in court on Monday.

SO ORDERED.



Paul A. Engelmayer
United States District Judge

Dated: October 16, 2021
New York, New York